UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

THE BLASTERS, DRILLRUNNERS AND MINERS UNION, LOCAL 29 OF THE LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

AND **CASE NO. 29-CE-120**

RWKS COMSTOCK, A JOINT VENTURE

James Kearns Esq. Counsel for the General Counsel
Preetpal Grewal Esq., for the Respondent
Edward T. Byrne Esq., for the Charging Party

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in Brooklyn, New York on April 27, 2004. On November 26, 2003, the charge was filed by RWKS Comstock, a joint venture. The Complaint, which was issued on February 12, 2004 alleged that the Union violated Section 8(e) by reaffirming, within the 10(b) period, via the initiation of arbitration proceeding, a provision in a contract that constitutes an illegal hot cargo clause.

I must admit that I had some difficulty understanding some of the arguments made by the Respondent. Nevertheless it seems that the Respondent contends that the clause in question is **(a)** a valid work preservation clause, **(b)** that the companies involved are joint employers and **(c)** and that the clause is protected by the construction industry proviso.

Based on the evidence as a whole, and after consideration of the Briefs filed, I hereby make the following findings and conclusions. [1]

[1] In its second amended Answer, the Respondent essentially admitted all of the factual allegations of the Complaint but asserted that even so, its actions do no amount to a violation of the Act. I note that although I allowed the Respondent to put into evidence the documents relating to an arbitration and the lawsuit relating to the arbitration, I made it clear that I was not taking this material, (such as affidavits or arbitration testimony), as proof of the matters asserted since that would be objectionable as hearsay. Thus, although I have considered the legal arguments made, I have not relied on any factual assertions made by the Respondent insofar as they are not contained in the Complaint, the Answer, in Judge Sifton's decision or by way of stipulation.

Findings and Conclusions

I. Jurisdiction

The Complaint alleges, the amended Answer admits and I find that L.K. Comstock & Company and RailWorks Transit, Inc. are corporation engaged in business in the State of New York and meet the Board's direct inflow standards for asserting jurisdiction. Accordingly I find that they are employers engaged in commerce within the meaning of Sections 2(2), (6), (7) and 8(e) of the Act. I also conclude based on the Answer to the Complaint that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

There is a company named RailWork Corporation that in this case, is the holding company for a number of subsidiaries. RailWorks Transit Inc., and L.K. Comstock & Company, Inc., both are subsidiaries of RailWorks Transit Systems, Inc., which is itself, a wholly owned subsidiary of RailWorks Corporation.

For reasons unknown to me, the two related companies, RailWorks Transit and L.K. Comstock, formed a joint venture to do certain work for the New York City subway, including signal work at the Bergen Street subway station in Brooklyn, New York. This particular work was done under a subcontract with Alcatel Transport Automation, Inc., who was the general contractor, presumably per a contract with the New York City Transit Authority. The work awarded to the joint venture included electrical construction and track work.

RailWorks Transit, one of the two partners in the joint venture, had assented to be bound by a collective bargaining agreement between the General Contractor's Association and various labor organizations including the Respondent. This contract, which runs from July 1, 2001 to June 30, 2006, contains a provision at Article 10, Section 2 paragraph 1 that reads:

> The terms, covenants and conditions of this Agreement shall be binding upon all Subcontractors at the site to whom the employer may have sublet all or part of any contract entered into by the Employer. To assure the maintenance of work opportunities, the Employer stipulates that any firm engaging in Heavy Construction Work under Article VIII, Section 1 and 2 of the Agreement, in which it has or acquires a financial interest or is participating in a venture with other contractors or operators, shall be responsible for compliance with all of the terms and conditions of this Agreement. The Employer agrees with the terms of this Agreement.

Initially, certain aspects of the work, called "chopping" work was assigned by the joint venture to M-Track Enterprises, (not surprisingly, another subsidiary of RailWorks Corporation) and also a member of the General Contractors Association. M-Track employed laborers who were represented by the Respondent or an affiliate of the Respondent. It appears that at some point, this work was reassigned by M-Track to employees who were members of or represented by Local 3, International Brotherhood of Electricians. The Respondent objected to this reassignment.

On July 22, 2003, the Respondent and its sister union, Local 731 filed unfair labor practice charge against Local 3, alleging that it threatened or coerced M-Track to reassign the work to electricians. (Presumably a charge filed under Section 8(b)(4)(D)). That charge was voluntarily withdrawn on August 20, 2003.

However, still not satisfied with the reassignment, the Respondent, by letter dated July 29, 2003, demanded arbitration under the terms of its contract with the General Contractors Association that is binding on RailWorks Transit. The Union was seeking to enforce the provisions of Article 10, Section 2 paragraph 1 described above. In essence, the Union was seeking to compel the joint venture, to be bound by the terms of the collective bargaining agreement with the Respondent and to thereby employ, in accordance with the terms of the contract, employees who are members of or represented by the Respondent or any affiliated union of the Respondent. The Union's theory was that as RailWorks Transit was one of the partners to the joint venture and a signatory to an agreement with the Union, the joint venture was also bound to the same agreement.

RWKS Comstock, the joint venture, (and the charging party in the present case), filed an action in New York Supreme Court seeking to enjoin the arbitration proceeding. This was removed to the United States District Court for the Eastern District of New York. On November 20, 2003, Judge Sifton issued a Memorandum and Order denying the joint venture's request for an injunction. He did so under Rule 56 of the Federal Rules of Civil Procedure, which allows for Summary Judgment where there are no material issues of fact. (Judge Sifton, however, did not foreclose a later action by the Company to challenge any arbitration award that was issued). In substance, Judge Sifton concluded that **(a)** the Union's request for arbitration was based on the terms of the collective bargaining agreement binding on RailWorks Transit, one of the partners of the joint venture, **(b)** that an injunction involving a labor dispute was not permitted under the Norris-LaGuardia Act; and **(c)** that no irreparable injury was shown. He also rejected the Plaintiff's request for tri-parte arbitration involving Local 3.

On November 26, 2003, RWKS Comstock filed the instant charge alleging that the agreement that the Union was seeking to enforce, violated Section 8(e) and therefore was null and void. This 8(e) argument was never made before Judge Sifton in the original action to enjoin the arbitration proceeding.

On December 1, 2003, RWKS Comstock filed a motion for reconsideration with Judge Sifton.

On December 2, 2003, the arbitration hearing commenced.

On December 16, 2003, RWKS Comstock filed a notice of appeal of the November 20 decision to the Second Circuit Court of Appeals. The appeal was stayed pending the outcome of the motion to reconsider before Judge Sifton.

On January 6, 2004, an award was issued in favor of the Union. The arbitration panel of the General Contractors awarded monetary damages to the Union and directed that the laborers represented by Local 29 be restored to their jobs.

On February 12, 2004, the Board's Regional office issued the instant Complaint.

On March 30, 2004, Judge Sifton, denied the Plaintiff's Motion for Reconsideration, noting *inter alia*, that it never made the 8(e) argument in the original case and therefore, under Rule 6.3 was precluded from advancing new arguments not previously advanced.

III. Analysis

Section 8(e) of the Act, in pertinent part, states:

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work:

The General Counsel argues that this case is governed by *Carpenters District Council of Northeast Ohio (Alessio Construction*), 310 NLRB 1023, (1993) and *Operating Engineers Local 520 (Massman Construction Co*.), 327 NLRB 1257 (1999).

In *Carpenters District Council*, supra, the issue was whether the Union violated 8(b)(3) by insisting, as a condition of reaching agreement on the inclusion of a clause called an "anti-dual-shop clause," aimed at "prohibiting or discouraging a unionized employer's maintenance of an affiliation with a nonunion company in a so-called double-breasting arrangement." The Board found that the Union did in fact violate 8(b)(3) because the insisted upon provision was an illegal "hot cargo" clause unlawful under Section 8(e) of the Act. The proposed clause stated:

> In the event that the partners, stock holders or beneficial owners of the company form or participate in the formation of another company which engages or will engage in the same or similar type of business enterprise in the jurisdiction of his Union and employs or will employ the same or similar classifications of employees covered by this Collective Bargaining Agreement, then that business enterprise shall be manned in accordance with the referral provision herein and covered by all the terms of this contract.

A Board majority, in concluding that the above quoted provision violated the Section 8(e), stated:

> It is an 8(e) clause because, by requiring the extension of the collective-bargaining agreement to Alessio's affiliates as it defines them, (1) it is calculated to cause Alessio to sever its ownership relationship with affiliated firms that seek to remain nonunion or to forebear from forming relationships with such firms, even though those firms are separate employers under court

> approved Board law, and (2) it is aimed not a preserving the work of Alessio's union-represented employees but rather at satisfying "union objectives elsewhere,", i.e., the objective of affecting the labor relations between the nonunion affiliated companies and their employees over which Alessio has no right of control. Such an attempt to impose a contract on separate employers of employees in "work units far removed from the contractual unit" is plainly secondary and is unlawful under Section 8(e), absent proviso protection.
>
> * * * *
>
> [W]e find that it clearly would apply on the basis of common ownership alone, and is not limited to cases in which common control or diversion of work is demonstrated. Thus, the proposed clause would apply even in circumstances where the signatory employer did not have the power to assign the disputed work to unit employees. Indeed, the proposed clause does not seek and would no require the assignment to unit employees of any work performed by the non-union "breast." Rather, the anti-dual-shop clause is aimed at ensuring that the other "breast's" employees are covered by the agreement. (footnotes and citations omitted).

In *Operating Engineers, Local 520*, supra, the issue was whether the Union engaged in a strike against Massman Construction Co., in an effort to compel that Employer to agree to an 8(e) clause. The proposed contract clause stated:

> The Employer shall require as a condition for entering into any joint venture or joint work undertaking or arrangement for construction work that all parties to the contract for such undertaking or arrangement accept and agree to be bound by this Agreement . The Employer shall be responsible for compliance with the requirements of this provision.

The Board, relying on *Alessio*, concluded that the proposed clause was an illegal hot cargo clause and was *not* protected by the construction industry proviso to Section 8(e). The Board stated:

> [W]e find no evidence that joint venture clauses like the clauses at issue in this case were part of the patter of bargaining in the construction industry at the time of the proviso's enactment in 1959. The disputed clauses are not subcontracting agreements of the sort previously found lawful by the Board and the courts, but instead like the antidual shop clause found unlawful in *Alessio*, are an attempt to control the signatory employer's business relationships…. (footnotes omitted).

In the present case, I see no significant difference between the clause involved here and the clauses involved in the cited cases. Notwithstanding the common ownership relationship between the joint venturers and the fact that one of the partners is a party to the labor agreement, there is no evidence here that the joint venture is not a *separate person* from the party having the labor agreement, as that term is used in the context of secondary boycott cases. See *Los Angeles Newspaper Guild Local 69, (Hearst Corp.)* 185 NLRB 303, (1970) enfd. Per curium, 443 F.2d 1173 (9th Cir. 1971), cert. denied 404 U.S. 1018. Moreover, even if there were such evidence, I

think that the General Counsel correctly argues that the clause is unlawful *on its face* because it does not limit the provision to those situations where there is both common ownership and control *or* where there is a diversion of struck work. [2]

It is of course true that that the contract was entered into more than 6 months before the charge was filed and therefore outside the 10(b) statute of limitations period. Nevertheless, the Board has held that where a union seeks to enforce a clause by way of contract arbitration, the agreement is re-entered into and therefore the bar is not applicable, if initiation of the arbitration procedure takes place within the 10(b) period. As I have concluded that the clause here is unlawful on its face and as it was re-entered into within the 10(b) period, I conclude that the statute of limitations would not bar the instant Complaint. *Carpenters Central Pennsylvania Regional Council (Novinger's, Inc.)* 337 NLRB No. 162.

In *Elevator Constructors (Long Elevator*), 289 NLRB 1095, (1988), the Board held that a Union violated Section 8(b)(4)(ii)(A) by filing a grievance that was predicated on a reading of the collective bargaining agreement that, if successful, would have resulted in a de facto hot cargo clause. That is, had the Union's grievance been successful and had the Union's interpretation of the contract clause been enforced by the Court, the Court's Order would have been one that was, itself, a violation of Section 8(e). The Board stated:

> Because we have concluded that the contract clause as construed by the Respondent would violate Section 8(e), we may properly find the pursuit of the grievance coercive, notwithstanding the Supreme Court's decision in *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983). Although holding that the Board could not enjoin, as an unfair labor practice, the lawsuit at issue in that case, the Court expressly noted that it was not dealing with a "suit that has an objective that is illegal under federal law." 461 U.S. at 737 fn 5. See also *Teamsters Local 705 v. NLRB (Emery Air Freight*), 820 F.2d 448 (D.C. Cir. 1987) (distinguishing between having an unlawful motive in bringing a lawsuit and seeking to enforce an unlawful contract provision).

In *Teamsters Local 705 v. NLRB (Emery Air Freight*), 820 F.2d 448 (D.C. Cir. 1987), the Board had held that the Union's filing of a grievance was an attempt, in violation of Section 8(b)(4)(ii)(B), to force one employer to cease doing business with another. In reversing the Administrative Law Judge's conclusion that the filing of a grievance could not constitute an unfair labor practice because of the decision in *Bill Johnson*, the Board, focusing on footnote 5 of the Supreme Court's opinion, concluded that the Union's object in filing the grievance was illegal and therefore *Bill Johnson's* did not provide protection. That is, the grievance, if successfully pursued would have led to a remedy which itself would have violated Section 8(e) of the Act. However, as the reviewing Court did not read the clause as illegal *on its face*, it remanded this aspect of the case so that the Board could explicate more fully why enforcement of the subcontracting clause, should be construed as the enforcement of an illegal hot cargo clause and not merely the legal enforcement of a clause designed to preserve unit work.

[2] I would think that it would not be too difficult for the Union to amend the contracts to meet the General Counsel's objections, at least to the extent that the provision would not be illegal on its face.

In light of my conclusion that the contract clause in the instant case contravenes, on its face, the provisions of Section 8(e) of the Act and as I have concluded that it was reentered with the 10(b) period, I hereby conclude that the Union violated Section 8(e) of the Act.

Conclusions of Law

1. By entering into, maintaining and reaffirming an agreement with RailWorks Transit Inc. that contained the provision at Article 10, Section 2, paragraph 1, the Respondent has violated Section 8(e) of the Act.

2. The above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend the issuance of an order directing it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [3]

ORDER

The Respondent, the Blasters, Drillrunners and Miners Union, Local 29 of the Laborers International Union of North America, AFL-CIO, its officers, agents and representatives, shall

1. Cease and Desist from

(a) Maintaining, giving effect to, or enforcing the provision at Article 10, Section 2, paragraph 1 of the agreement effective between it and RailWorks Transit.

(b) Violating, in any like or related manner, Section 8(e) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in White Plains, New York, copies of the attached notice marked "Appendix." [4] Copies of the notice, on forms

---

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF

Continued

provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Also, if the Union publishes a newsletter for its members, this notice should be published therein. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and mail a copy of the notice to Railworks Inc., and to the General Contractor's Association.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

_____
Raymond P. Green
Administrative Law Judge

APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT Maintain, give effect to, or enforce the provision at Article 10, Section 2, paragraph 1 of the agreement effective between us and RailWorks Transit.

The Blasters, Drillrunners and Miners Union, Local 29 of the Laborers International Union of North America, AFL-CIO

(Union)

Dated _____ **By** _____

(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov. One MetroTech Center, Telephone 718-330 2862. Hours: 9 a.m. to 5:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER 718-330-2862.